82-1727

NO. _____

Office-Supreme Court, U.S.
FILED
APR 22 1983
ALEXANDER L. STEVAS,
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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1982

SAMUEL THOMAS RICKMAN,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

On Appeal From the Supreme Court of Georgia

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Did the Georgia Court of Appeals, as upheld by the Georgia Supreme Court, err in holding that the Georgia parties-to-a-crime statute was constitutionally valid, despite Appellant's argument that the statute was unconstitutional on its face and in its application to this Appellant? *

* The parties to the proceedings in the Georgia Courts were Samuel Thomas Rickman, Appellant and the State of Georgia, by and through the District Attorney for the Cobb Judicial Circuit, Appellee. Additionally, though not a party below, this appeal was served on the Attorney General for the State of Georgia. There were two co-Defendants at Appellant's case below, one of whom, Rodney Wayne Ellis, has filed a Petition for a Writ of Certiorari with this Court.

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OCTOBER TERM, 1982

SAMUEL THOMAS RICKMAN,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

On Appeal From the Supreme Court of Georgia

JURISDICTIONAL STATEMENT

Appellant, SAMUEL THOMAS RICKMAN, appeals from the judgment of the Supreme Court of Georgia entered on January 25, 1983, which, by virtue of not granting a Petition for Writ of Certiorari to review the Opinion of the Court of Appeals of Georgia which affirmed Appellant's conviction below, did in fact affirm his conviction for violation of the Georgia Controlled Substances Act. This Jurisdictional Statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are present.

OPINIONS BELOW

The Opinion of the Court of Appeals of Georgia, entered on October 18, 1982, being Case No. 63999, is published at 164 Ga.App. 366, 296 S.E.2d 726 (1982). A copy of that Opinion is attached hereto as Appendix "A."

The denial of a Petition for Writ of Certiorari, as applied for by Appellant following the aforesaid decision of the Court of Appeals and his Motion for Rehearing to that Court, entered on January 25, 1983, is unpublished. A copy of that denial is attached hereto as Appendix "B."

JURISDICTION

Pursuant to Indictment dated November 5, 1979, returned by the Grand Jury for Cobb County, Georgia, Appellant was tried and convicted by a jury in the Superior Court of Cobb County, the Honorable John W. Williford, Senior Judge, Georgia Superior Courts, presiding, of violation of the Georgia Controlled Substances Act, Ga. Code Ann. §§ 79A-8, et seq. (now O.C.G.A. §§ 16-3-1, et seq.) on February 16, 1981. Appellant was sentenced to serve seventeen years, with twelve years to be served in prison and five years on probation.

At the conclusion of presentation of evidence and argument by counsel, the jury which convicted Appellant was charged on the law of parties-to-a-crime, Ga. Code Ann. §§ 26-801, 26-802 (now O.C.G.A. §§ 16-2-20, 16-2-21), over objection by defense counsel. On Motion for New Trial, and in his appeal below, Appellant argued that the aforesaid Georgia parties-to-a-crime statute was unconstitutional, both on its face and as applied to this Appellant and others similarly situated. The Court of Appeals of Georgia, which rendered a written Opinion in this case, held that the parties-to-a-crime statute was constitutional and that it had consistently been held constitutional by the appellate Courts of the State of Georgia. See, Division No. 13, Georgia Court of Appeals Opinion, 164 Ga.App. 366, 372, 296 S.E.2d 726 (1982), attached hereto as Appendix "A." Moreover, the Georgia Court of Appeals affirmed the use of the parties-to-a-crime statute as rationale for denying Appellant's Motion for Severance and related issues at trial. See, Division Nos. 6 and 8, Georgia Court of Appeals Opinion, id., 164 Ga.App. 366, 368-370. Additionally, the Georgia Court of Appeals, in its Opinion below, further misconstrued and misapplied, in an unconstitutional manner, the Georgia parties-to-a-crime statute in Division 6 of its Opinion,

id., 164 Ga.App. 366, 368-369, in treating the parties-to-a-crime statute as if were the same as or akin to the Georgia conspiracy statute(s). These contentions of Appellant were held to be without merit by the Court of Appeals of Georgia, and by the Supreme Court of Georgia in refusing to grant a Writ of Certiorari to review the Court of Appeals opinion, which affirmed Appellant's conviction.

Jurisdiction to review the decision of the Supreme Court of Georgia is conferred on this Court by Title 28, United States Code, Section 1257(2). Cohen v. California, 403 U.S. 15, 18 (1971).

QUESTION PRESENTED

Did the Georgia Court of Appeals, as upheld by the Georgia Supreme Court, err in holding that the Georgia parties-to-a-crime statute was constitutionally valid, despite Appellant's argument that the statute was unconstitutional on its face and in its application to this Appellant?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This appeal involves the Georgia parties-to-a-crime statute, Sections 26-801 and 26-802, Georgia Code

Annotated (now O.C.G.A. §§ 16-2-20 and 16-2-21); the Georgia conspiracy law, Section 26-3201, Georgia Code Annotated (now O.C.G.A. § 16-4-8); and the Georgia conspiracy to commit drug offenses statute, Ga. Code Ann. § 79A-812 (now O.C.G.A. § 16-13-33). These statutes are set forth verbatim in Appendix "C."

This appeal involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America, alleging deprivation of Appellant's rights to due process of laws, effective assistance of counsel and equal protection of the laws.

STATEMENT OF THE CASE

Appellant was convicted of violating the Georgia Controlled Substances Act; specifically, possession with intent to distribute cocaine. Appellant was so charged in one Count of a two-Count Indictment, being No. 79-2007 (Cobb County, Georgia). He was charged with no other offense.

Appellant was indicted jointly in said Indictment with Rodney Wayne Ellis and Robert Marion Hoskins, both of whom went to trial with this Appellant as co-Defendants, despite each of these three co-Defendants having moved repeatedly for severance and separate trials, and after a fourth co-Defendant, Brenda Elaine

Klutz, entered a plea prior to trial. All three remaining co-Defendants, including Appellant, were convicted by a jury in the Superior Court of Cobb County on February 16, 1981, and sentenced thereafter to identical sentences, namely twelve years to serve and five years on probation.

In essence, this case involved the sale of a contraband substance, cocaine, allegedly as between the co-Defendants, including Appellant, and an informant and an undercover agent of the Cobb County Police Department. The one co-Defendant who was the "go-between" was Robert Marion Hoskins. Hoskins pled entrapment.

Appellant RICKMAN filed a pre-trial Motion to Sever, even before knowledge that co-Defendant Hoskins would plead entrapment. The Trial Court, on hearing pre-trial Motions, denied the Motion to Sever. Thereafter, and especially after knowledge that co-Defendant Hoskins would plead entrapment and admit the offense, Appellant and co-Defendant Ellis repeatedly argued for severance; they did this during trial, on Motion for a Directed Verdict of Acquittal, at the close of the State's evidence, and at the close of all the evidence. Both Appellant and co-Defendant Ellis sought to have the Trial Court charge the jury explicitly that

it was not to consider any evidence adduced against Hoskins or any other person after each had rested his case. The Trial Court refused to give these curative instructions, relying instead on a standard, general charge that the jury was to consider each co-Defendant individually.

The facts at the trial, not in dispute, established that the alleged drug deal "went down" at a motel in Cobb County, Georgia. The informant and undercover agent were located in one motel room, and, at the time of the arrest, Appellant and co-Defendant Ellis were located in an adjacent room at the motel. The co-Defendant who pled entrapment, Hoskins, was found in the motel room with the undercover agent and the informant at the time of the arrest. Also found in that room was approximately one pound of cocaine. This cocaine formed the gravamen of the possession with intent to distribute charge against Appellant, which is the only offense charged to him in the Indictment.

The District Attorney, as one of his requested charges to the jury, sought to have Appellant Rickman and the other co-Defendants charged not only with the violation of the Georgia Controlled Substances Act as in the Indictment, but also as parties to a crime pursuant to Ga. Code Ann. §§ 26-801 and 26-802 (now O.C.G.A.

§§ 16-2-20 and 16-2-21)(Appendix "C"). Although the Trial Court did not use the language of the parties-to-a-crime statutes verbatim, the Court did essentially charge the jury that they could convict Appellant and the co-Defendants as parties to a crime even if, as the statute provides, the jury were to find that they did not directly commit the crime.[1] This charge to the jury was given over objection to the charge by counsel for Appellant's co-Defendant Ellis, and by trial counsel for this Appellant. This objection by defense counsel followed numerous objections throughout the course of the trial relating to allowing evidence to go to the jury as to co-Defendant Hoskins, who pled entrapment and admitted the offense while testifying that Appellant RICKMAN had nothing to do with the offense, and

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[1] This scenario is itself problematic, in that a person can be charged with directly commiting the substantive crime and also, the way Georgia prosecutors are wont to use the parties-to-a-crime law, as a party to a crime which includes by its terms "a person [who] directly commits the crime." Ga. Code Ann. § 26-801(b)(1). By allowing the jury to be charged both ways, the State is being allowed to go against the Appellant on two distinct penal statutes -- the drug violation and parties-to-a-crime -- for the very same transaction and same offense. This it cannot do. United States v. Girst, 645 F.2d 1014, 1017 (D.C. Cir. 1979). See also, Bell v. United States, 349 U.S. 81 (1955).

numerous objections by defense counsel that their trials should be severed from the co-Defendants.

In its written Opinion dated October 18, 1982, at Division 13, the Court of Appeals, citing earlier Georgia case law, holds that the parties-to-a-crime statute is constitutional. Op cit., 164 Ga.App. 366, 372 (Appendix "A"). For that finding and numerous other findings as raised by each co-Defendant, the Georgia Court of Appeals affirmed the convictions of this Appellant and each co-Defendant.

Appellant petitioned the Georgia Court of Appeals for a rehearing, which was denied on November 12, 1982, and then petitioned the Supreme Court of Georgia for a Writ of Certiorari, which was refused on January 5, 1983, as was a Motion for Reconsideration on January 25, 1983, thereby affirming the Court of Appeals' affirmation of Appellant's conviction.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. It is a denial of due process and equal protection under to the Fifth and Fourteenth Amendments to the Constitution of the United States, for the Court of Appeals of Georgia to refuse to address a constitutional objection raised by an Appellant, based on an unsubstantiated, conclusory statement that the constitutional issue was not precisely presented below in the format desired by the Court of Appeals, and that threshhold question is an important and proper constitutional matter to be resolved by this Court.

Both the District Attorney, in his Reply Brief to Appellant's appeal to the Georgia Court of Appeals, and in its Opinion dated October 18, 1982, the Court of Appeals concludes baldly that "because Appellant made no constitutional objection to either the charge [on parties-to-a-crime] or the statute [id.] at trial, we will not address his enumeration [contesting the constitutionality on its face and as applied of the parties-to-a-crime statute] other than to note that the Supreme Court held that Code Ann. §§ 26-801 and 802 were not unconstitutionally vague, indefinite and overbroad in Wanzer v. State, 232 Ga. 523(6) (207 S.E.2d 466)." (Appendix "A"; 164 Ga.App. 366, 372).

In the State's Brief to the Court of Appeals, the District Attorney cites no authority whatsoever for his statement that trial counsel's objections to the charges to the jury, including parties-to-a-crime, was not sufficient to raise a constitutional attack. In its affirmation of that assertion by the District Attorney, the Court of Appeals, as set forth supra, simply repeats that supposed precept of law. The only authority apparently in support of its position, as set forth in Division 13 of the Court of Appeals Opinion (Appendix "A") is Corley v. State, 154 Ga.App. 301(2), 268 S.E.2d 76 (1980). The Corley opinion states merely

that "constitutional issues first raised on appeal present nothing for our decision. Tenant v. State, 243 Ga. 595 (255 S.E.2d 710) [sic]"; the Opinion sets forth absolutely no other authority or law. The Opinion rendered by the Georgia Supreme Court in Tenant v. State, 243 Ga. 595, 256 S.E.2d 382 (1979), does not go to the issue of whether the Georgia Court of Appeals may entertain an issue raised first on appeal, but rather stands merely for the proposition that a constitutional issue not raised during the trial of the case but in a Motion for New Trial, properly goes to the Court of Appeals rather than to the Supreme Court of Georgia. Id. The Georgia Supreme Court in Tenant, id., refers merely to its earlier opinion in Thrall v. State, 226 Ga. 308, 174 S.E.2d 925 (1970), which simply restates the opinion in Tenant, without further elaboration or differing authority, citing Hogan v. State, 224 Ga. 419, 162 S.E.2d 408 (1968) and Corbin v. State, 212 Ga. 231, 91 S.E.2d 764 (1956) (the statute attacked in Corbin was later found to be unconstitutional).

Thus, the State has failed to set forth any clearly enunciated rule with regard to raising constitutional attacks on State statutes in a timely manner, other than by the aforecited conclusions of law. Much less does Georgia make any showing of a legitimate State interest

in denying an Appellant the right to have the highest Courts of the State of Georgia consider the constitutionality of a State statute. Henry v. Mississippi, 379 U.S. 443, 447 (1965). This Supreme Court of the United States has jurisdiction over appeals attacking the constitutional validity of State statutes, when a decision of the highest Court of that State has found such statute valid. 28 U.S.C. § 1257(2).[2] Whether or not such appeal so presented is properly before the Court is itself a constitutional issue over which this Court has jurisdiction. Henry v. Mississippi, id., citing Love v. Griffith, 266 U.S. 32, 33-34 (1924). This Court is not bound by a State Court's conclusion that a constitutional issue has been waived because not presented in a manner below in accordance with the self-proclaimed rules of that State Court, and this determination is itself a question of Federal law which the Supreme Court "must ultimately decide." Liner v. Jafco, Inc., 375 U.S. 301 (1964), cited in Henry v. Mississippi, op cit.

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2 The Georgia parties-to-a-crime statute apparently has never been reviewed by this Court. Appellant urges that it is ripe for review because of misapplication and abuse as set forth hereinbelow.

Appellant was not charged as a party to a crime in the Indictment against him. He was charged with one offense and one offense only: possession with intent to distribute cocaine. The State's theory that Appellant could be convicted, for direct commission of the offense or as a party thereto, or both (see, note 1, supra), was not made until the close of the trial when the Judge gave such charges to the jury. Appellant objected, as did counsel for co-Defendant Ellis, to the jury being charged on the law of parties-to-a-crime, as he also objected to numerous other charges which the Court gave to the jury or which the Court failed to give the jury after Appellant's request. On Motion for New Trial, Appellant argued the unconstitutionality of the Georgia parties-to-a-crime statute, and strenuously made the same argument in his appeal. Quite simply, Appellant did everything he could at the appropriate times, to challenge the propriety and appropriateness of the very proceedings or trial errors which then later formed the basis for the State seeking a charge on parties-to-a-crime.

The machinations of the Georgia Courts to avoid challenges raised by Appellant in the State Courts to the constitutional validity of Georgia statutes are well established before this Court. Wright v. Georgia, 373

U.S. 284 (1963). See also, Whitus v. Georgia, 385 U.S. 545, 645 (1967); and Whitus v. Balkom, 333 F.2d 496, 498, 505, 509-510 (5th Cir. 1964) (on the issue of "fictitious waiver"). As found by this Court in Wright v. Georgia, 373 U.S. 284, 290 (1963), the Supreme Court of Georgia at that time apparently was basing its refusal to consider a constitutional challenge on what was then Section 6-1308 of the Georgia Code Annotated, since repealed. However, this Court found, at 373 U.S. 291, that contrary to the efforts of the Georgia Supreme Court to avoid hearing the constitutional challenge urged upon it by the appellant in that case:

> "Petitioners [obviously] did in fact argue the point which they press in this Court. . . .In short the Georgia court would require the petitioners to say something like the following. . .'A fortiori it was error for the trial court to overrule the motions for a new trial.' As was said in a similar case coming to us from the Georgia courts, this 'would be to force resort to an arid ritual of meaningless form. Staub v. City of Baxley, supra, 355 U.S. at 320. . . .'A local procedural rule. . .cannot avail the State here, because petitioner[s] could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court.' . . .We proceed to a consideration of the merits of petitioners' constitutional claim."

Similarly, in Douglas v. Alabama, 380 U.S. 415 (1965), this Court again rejected a State claim that the constitutional validity of a State statute had not proper-

ly been drawn into question, and was therefore not to be considered by the State Courts, simply because trial counsel had failed to object in the specific and precise language or manner which the Court thereafter required. Id. 380 U.S. 415, 420-422.

Throughout the trial, Appellant's trial counsel objected to the taint and spill-over of evidence against Appellant by virtue of the Court's failure to sever the co-Defendant pleading entrapment and as to allowing evidence of a conspiratorial nature to be presented against Appellant when neither he nor the jury was charged on the law of conspiracy. These objections went to the only substantive issues that were before the Court at those times. Further, Appellant moved for a directed verdict of acquittal at the close of evidence, which was denied. This, too, went to the ultimate issues later presented to the jury on parties-to-a-crime. However, at the time such objections were made, the issue of charging on parties-to-a-crime had not been joined, nor was that statutory offense charged to this Appellant.

To require the Appellant to have raised objections perfect in form before he did, and to deny him the opportunity to challenge the constitutional validity of the statute at issue, is to place form over substance.

A State Court cannot do this, and its efforts to do so are reviewable and must be reviewed by this Court. Douglas v. Alabama, 380 U.S. 415 (1965); Henry v. Mississippi, 379 U.S. 443 (1965); and Wright v. Georgia, 373 U.S. 284 (1963).

In Douglas v. Alabama, 380 U.S. 415, 422 (1965), this Court allowed that if the State of Alabama could have shown a "legitimate State interest" served by its reliance on procedural rules to deny a constitutional attack on a State statute, it might be sufficient to withstand review by the Supreme Court of the United States. Id. However, in that case, as in the case sub judice, the State Court has neither shown a specific and enunciated procedural rule upon which an Appellant might be on notice as to the specific format of raising a constitutional claim in order to preserve it, nor has the State shown any legitimate interest in denying constitutional review. There is no rule of the Georgia Court of Appeals or of the Georgia Supreme Court which puts this Appellant on notice as to the conclusion enunciated in the Court of Appeals Opinion at Division 13 (Appendix "A"), and the case cited in that Division 13, Corley v. State, op cit., and other cases cited hereinabove, are bald conclusions only and do not set forth any State interest for their application to this Appel-

lant.

Regardless of the attempt by the Georgia Court of Appeals to evade the constitutional attack on the parties-to-a-crime statute, the Court in that very same Division 13 of its Opinion (Appendix "A"), states that the parties-to-a-crime statutes, Sections 26-801 and 26-802, are "not unconstitutionally vague, indefinite and overbroad," citing Wanzer v. State, 232 Ga. 523(6), 207 S.E.2d 466 (1974), wherein the Georgia Supreme Court concluded, simply and without elaboration, that "there is no merit in the contention that [Code Ann. § 26-801] is unconstitutionally vague, indefinite and overbroad." Id., 232 Ga. 529. Thus, although its reasons are not entirely clear, the Court of Appeals of Georgia, as affirmed in the case sub judice by the Supreme Court of Georgia, has in fact upheld the constitutionality of the Georgia parties-to-a-crime statute, in the face of Appellant's constitutional attack thereon.

B. The Georgia parties-to-a-crime statute is unconstitutionally vague, indefinite and overbroad.

The Georgia parties-to-a-crime statute, being comprised of Sections 26-801 (setting forth who may be a party to a crime) and 26-802 (providing that one who is a party to a crime may be convicted and sentenced as a

person who directly commits a crime), Georgia Code Annotated (now O.C.G.A. §§ 16-2-20 and 16-2-21), is vague and overbroad. A person whom the State wishes to charge and convict thereunder, cannot be on notice as to the nature of the charges against him or as to the punishment to which he is being submitted. The party so charged cannot have effective assistance of counsel because the charges are so vague, and he is not able to defend himself against evidence brought against him as a party to a crime. Finally, the purported party to a crime is being denied equal protection of the laws in that he is not afforded the ability to defend himself as is one who is charged only with directly committing a crime. Amendments V, VI and XIV, Constitution of the United States.

The parties-to-a-crime statute in Georgia is of recent vintage, having been passed by the State Legislature in 1968, as part of a package repealing those provisions of Georgia law which related to principals and accessories to a crime, formerly Ga. Code Ann. Chapters 26-5 and 26-6. See, Committee Notes to Chapter 26-8, Georgia Code Annotated, 1968. However, when the language of the present parties-to-a-crime statute is read alongside the previous Georgia Code sections on accessories and principals, the new Code

Section is much broader; thus, rather than simply restating and recodifying the previous Code Sections, the new Code Section, contrary to the legislative intent, becomes overbroad, vague and ambiguous. The repealed Georgia Code Sections on principals (Ga. Code Ann. §§ 26-501 and 502) and accessories (Ga. Code Ann. §§ 26-601, 602 and 604), are reprinted at Appendix "D." For example, the new parties-to-a-crime statute, going beyond the previous aforecited Code Sections, makes one a party to a crime because he is "concerned in the commission of a crime," if he, among other things, "advises or encourages another person to commit the crime directly." Section 26-801(b)(4), Georgia Code Annotated (now O.C.G.A. § 16-2-20(b)(4)). The language of the predecessor principals and accessories statutes, however, is much more specific in defining and putting a Defendant on notice as to when he might be charged and convicted for commission of a crime.

This statute encompasses by its terms a class of persons larger than intended by the legislature; it is virtually impossible to determine the class of persons who comprise "parties-to-a-crime." When such a statute is given as a charge to a jury, especially where, as in this case, the evidence against a co-Defendant is over-

whelming relative to this Appellant, Appellant shows there is no way such a charge could be other than confusing and would tend to lead the jury to the conclusion that anyone -- including this Appellant -- is a party to a crime simply because they had "something," however, minimal, to do with events surrounding a crime. This is the danger of overbreadth and vagueness in this statute; it confuses the jury and necessarily works harmful prejudice on the Appellant.

C. Where there is an ambiguity in a criminal statute, it must be construed in favor of the accused. Failure to do so violates due process and equal protection.

As stated hereinabove, the Georgia parties-to-a-crime statute is vague and ambiguous and therefore must be construed in light of any ambiguity in favor of the accused and strictly against the State. This basic precept of constitutional law is recognized even by the Courts in the State of Georgia. Matthews v. Everett, 201 Ga. 730, 41 S.E.2d 148 (1947); see also, Paras v. State, 247 Ga. 76, 279 S.E.2d 451 (1981). A statute is invalid for uncertaintly when it requires or forbids the doing of an act in such terms that reasonable men must guess at its scope or meaning or must guess at the meaning of the statute and differ as to its application. Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962).

The words and phrases used in a statute must be given the meaning intended by lawmakers. Brotherhood of Locomotive Firemen & Enginemen v. Northern Pac. Ry., 274 F.2d 641 (8th Cir. 1960). Therefore, in the case sub judice, where the parties-to-a-crime statute was intended only to recodify the existing principals and accessories statutes, it cannot and should not be interpreted to go beyond that. In this case, and as in other cases cited hereinbelow, however, the Courts of Georgia are construing the parties-to-a-crime statute beyond its clearly intended meaning. Penal statutes cannot be enlarged by implication or intendment beyond the language used or the legislative intent. See, generally, Ladner v. United States, 358 U.S. 169 (1958); Shaver v. United States, 174 F.2d 618 (9th Cir. 1949); United States v. Walter, 484 F.Supp. 183 (S.D. Ga. 1980); and Wood v. State, 219 Ga. 509, 134 S.E.2d 8 (1963).

Penal statutes cannot be held to include offenses or persons other than those which are clearly described and provided for, even though a Court may think the legislature should have made the statutes more comprehensive. United States v. Weitzel, 246 U.S. 533 (1917); Ventimigilia v. United States, 242 F.2d 620 (9th Cir. 1957); and also, generally, 82 C.J.S. Statutes

§ 389, p. 928. Whenever a criminal statutes admits of two constructions, that which is more favorable to the accused is to be preferred. Ornelas v. United States, 236 F.2d 392 (9th Cir. 1956).

It is not up to the Courts of any State, including Georgia, to broaden legislative intent. These Courts are charged with applying penal statutes as clearly as possible, and where there is any doubt as to whether or not a defendant falls within the proscribed class of activity or persons, the statute must be applied strictly against the State and in favor of the defendant. Hollowell v. Jove, 247 Ga. 678, 279 S.E.2d 430 (1981); Sale v. Leachman, 218 Ga. 834, 131 S.E.2d 185 (1963); Rayle Electric Membership Corp. v. Cook, 195 Ga. 734, 25 S.E.2d 574 (1943); Cook v. State, 141 Ga.App. 241, 233 S.E.2d 60 (1977); and Benefield v. Malone, 110 Ga.App. 607, 139 S.E.2d 500 (1964).

D. The Georgia Appellate Courts are subjecting this Appellant to an improper application of the Georgia parties-to-a-crime statute because they are using it as a general conspiracy statute, contrary to legislative intent and in violation of Appellant's Federal Constitutional rights.

The Georgia parties-to-a-crime statute was enacted to recodify pre-existing law on principals and accessories. It was not then nor can it be now intended as

a conspiracy statute. See, Committee Notes, Chapter 26-8, Georgia Code Annotated, 1968. The legislative committee considering the parties-to-a-crime statute specifically stated that, as to the previous law on principals and accessories, the new law "is not a change from former Georgia law." Id. at introduction.

Nowhere in the legislative history is there any indication that the parties-to-a-crime statute was intended to comprise or serve as a conspiracy statute. In fact, one year later, in 1969, the Georgia legislature specifically passed a general conspiracy statute, reinforcing the fact that the parties-to-a-crime is intended to reach persons other than those involved in a conspiracy. The general conspiracy statute is found at Ga. Code Ann. § 26-3201 (now O.C.G.A. § 16-4-8), attached hereto as Appendix "C." (There is also a specific conspiracy statute within the Georgia Controlled Substances Act, being Section 79A-812, Georgia Code Annotated, now O.C.G.A. § 16-13-33. The difference between the drug offense conspiracy and the general conspiracy statute is one of penalty, and this is not at issue here.)

The Georgia Courts have repeatedly blurred the distinction between the conspiracy and parties-to-a-crime statutes. The Georgia Court of Appeals is using

the parties-to-a-crime statute as if it were, and for the same purposes as, the conspiracy statute. For example, in Division 6 of its Opinion hereinbelow (Appendix "A"), the Georgia Court of Appeals, in quoting one of its earlier opinions, states that "while Ga. Code Ann. Section 26-801 does not use the word 'conspiracy' it is plain that it embodies the theory of conspiracy." Rickman v. State, 164 Ga.App. 366, 369, 296 S.E.2d 726 (1982), citing Hamby v. State, 158 Ga.App. 265(2), 279 S.E.2d 715 (1981). See also, the reliance by the Supreme Court of Georgia on Scott v. State, 229 Ga. 541, 192 S.E.2d 367 (1972).

Hughes v. State, 150 Ga.App. 90, 91, 256 S.E.2d 639 (1979), further blurs the distinction between parties-to-a-crime and conspiracy, by specifically finding that a "person concerned" in the commission of the crime under Section 26-801, is chargeable as and like a conspirator. Likewise, the District Attorney, in his Brief to the Georgia Court of Appeals, quite blatantly talks in terms of Appellant being part of a conspiracy, citing Crosby v. State, 232 Ga. 599, 601, 207 S.E.2d 515 (1974).

The State has completely misconstrued the parties-to-a-crime statute as being applicable to a conspiracy situation or being used in lieu of a conspiracy statute,

when in fact the clear legislative intent is contra.

Appellant was not indicted for conspiracy. Although the law in Georgia is that a defendant may be convicted of conspiracy, based on evidence introduced at trial and notwithstanding the fact that he was not indicted for conspiracy, to do so the elements of conspiracy still must be proved. This includes evidence that there was a plan among the co-conspirators, Curtis v. State, 150 Ga.App. 507, 508, 258 S.E.2d 247 (1979); that there must be some element of affirmative cooperation or at least an agreement to cooperate, Stinson v. State, 151 Ga.App. 533, 539, 260 S.E.2d 407 (1979), citing United States v. Collins, 552 F.2d 243, 245(1-3) (8th Cir. 1977); that there must be more than spatial proximity between an alleged co-conspirator and contraband, Stinson v. State, Id. at 151 Ga.App. 540, citing Donaldson v. State, 134 Ga.App. 755, 756, 216 S.E.2d 645 (1975); that the conspiracy evidence must not only be consistent with the hypothesis of guilt "but shall exclude every other reasonable hypothesis save that of the guilt of the accused," Sentell v. State, 227 Ga. 153, 156, 179 S.E.2d 234 (1971); and that there must be a "corrupt agreement between two or more persons to do an unlawful act," Caldwell v. State, 227 Ga. 703, 706, 182 S.E.2d 789 (1971), citing Fincher v. State,

211 Ga. 89(4), 84 S.E.2d 76 (1954). In the case sub judice, the elements of conspiracy were not proved, and therefore a charge on conspiracy was neither warranted nor given.

Additionally, however, no charge of conspiracy could be given to the jury because, in Georgia -- an exception to the "no-merger rule" -- once there is firm evidence that the substantive crime has been committed, there can be no separate conviction for conspiracy. Evans v. State, 161 Ga.App. 468, 471, 288 S.E.2d 726 (1982). Since in the case sub judice Appellant was charged with possession with intent to distribute cocaine, and the fact of a large amount of cocaine having been present in a motel room adjacent to the one in which Appellant was arrested having been proved, there could be no conspiracy charged to the jury nor could Appellant be convicted of conspiracy.

The great harm done to this Appellant, and to numerous others, is that the Courts of Georgia, and specifically the Georgia Court of Appeals and the Supreme Court in the case sub judice, utilize the parties-to-a-crime statute as if it were a conspiracy statute, to circumvent the clear rule in Georgia that there is a merger of conspiracy and the substantive offense. This is a clear and blatant unconstitutional

application of the parties-to-a-crime statute, and is ripe for review by this Court. For oft-cited cases in which the Georgia Courts have so misconstrued the conspiracy and parties-to-a-crime statutes, see, Scott v. State, 229 Ga. 541, 544, 192 S.E.2d 367 (1972); and Hamby v. State, 158 Ga.App. at 265, 279 S.E.2d 715 (1981), wherein the Court of Appeals expressly equates conspiracy and parties-to-a-crime, holding "the evidence amply authorized a charge on conspiracy under Code Ann. § 26-801," (emphasis added), quoting Harvey v. State, 233 Ga. 41, 44(5), 209 S.E.2d 587 (1974).

The Georgia Courts have attempted to explain their way out of an improper application of the parties-to-a-crime statute to embrace a conspiracy theory, on the grounds that conspiracy is a lesser included offense of parties-to-a-crime. Gunter v. State, 243 Ga. 651, 660, 256 S.E.2d 341 (1979) and Dutton v. State, 228 Ga. 850, 853, 188 S.E.2d 794 (1972). Due process requires that one accused of a crime be fully apprised of the charges against him, and that while an accused may be convicted of a lesser or included crime of the crime charged in an indictment, he may not be convicted of a distinct offense. Salinas v. United States, 277 F.2d 914 (9th Cir. 1960); see also, generally, 42 C.J.S. Indictments § 295, p. 1324. Conspiracy in Georgia is a

separate and distinct offense, and although, as cited hereinabove, it need not be charged in an indictment for a conviction thereon to hold, the elements must be proved. These elements include those listed hereinabove, and if they are not so proved, as in the case sub judice, then a conviction on conspiracy cannot hold. Any effort to charge conspiracy cloaked in the disguise of parties-to-a-crime, in order to broaden the evidence brought to bear against a defendant, or to confuse a jury, fails utterly to inform either the defendant or the jury of definitive charges. See, e.g., Brooks v. State, 141 Ga.App. 725, 729-730, 234 S.E.2d 541 (1977).

Where a conspiracy cannot hold and cannot be charged if the elements are not proved, or where a conspiracy theory does not lie as a matter of law, for a Court to charge parties-to-a-crime as if it were a conspiracy statute for the express purpose of incorporating a conspiracy theory, clearly and grossly violates due process and equal protection of the laws. The State of Georgia cannot do indirectly what the law and the Constitution expressly prohibit it from doing directly. It has done so in the case at bar, continues to do so with regard to other similar cases, and these gross violations of this Appellant's constitutional rights

to due process and equal protection of the laws cannot go unremedied, but are, rather, ripe for review by this Court.

E. The Georgia Court of Appeals and Supreme Court are applying the parties-to-a-crime statute against this Appellant in an unconstitutional manner, by way of utilizing said statute as a reason to deny Appellant a severed trial.

Appellant filed a pre-trial Motion for Severance, and repeatedly made timely requests to sever and objections to evidence introduced which he argued would not be admissible against him on a severed trial. Appellant argued these matters in opposition to charges given the jury and in his Motion for New Trial and on appeal below.

Appellant was not only denied a Motion to Sever, but was denied the charges he and counsel for co-Defendant requested to cure the possibility that the jury would improperly consider the strong evidence against the co-Defendant pleading entrapment against this Appellant. Appellant argued the "taint" of such evidence and the "spill-over effect" on him were highly prejudicial and constituted grounds for a reversal. However, the Court of Appeals, in Divisions 6 and 8 of its Opinion (Appendix "A"), relied on the aforecited parties-to-a-crime statute as reason for denying Appel-

lant a severance. The Court of Appeals concluded, as argued by the District Attorney in his appellate Brief, that since the evidence Appellant sought to have excluded by virtue of not having been granted a severance could have been introduced against him anyway because he was a "party to the crime," Appellant's request for a severance was moot.

Thus, whenever the Georgia Court of Appeals in the case sub judice (or in similar cases cited hereinabove), arrives at a roadblock raised by Appellant, it is met head-on by ritualistic recital of the parties-to-a-crime statute. Whenever the Court of Appeals arrives at a fork in the road, requiring a decision to review an issue raised by Appellant or to grant him constitutionally-based relief, the Court relies on the talismanic, black-letter parties-to-a-crime statute as the judicial roadmap requiring taking a course other than that sought by the Appellant. The parties-to-a-crime statute is not and cannot be used as a conspiracy statute; and it does not afford proper grounds for denial of a motion to sever wherein Appellants have raised substantial questions of prejudicial taint and spill-over. By using parties-to-a-crime as a conspiracy statute, while not alleging or proving a conspiracy, the Georgia Courts fail to put Appellant on sufficient notice of the evidence to be

used against him, since the parties-to-a-crime statute is much broader than the language of the substantive crime charged and it is not a lesser included offense. This violates elementary precepts of due process, effective assistance of counsel and equal protection of the laws. Amendments V, VI and XIV, Constitution of the United States.

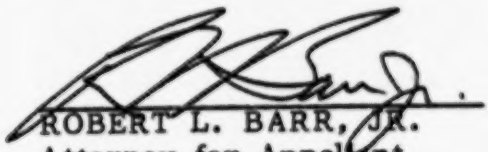
CONCLUSION

It is submitted that the Supreme Court of Georgia erred in upholding the constitutionality of the Georgia parties-to-a-crime statute, which is unconstitutional on its face. It is further submitted that the Georgia Supreme Court erred in affirming Appellant's conviction, and in sustaining the Court of Appeals' affirmation thereof, based on an unconstitutional application of the Georgia parties-to-a-crime statute, using it for purposes clearly not intended by the legislature, and to circumvent Georgia law and the Constitution of the United States and in violation of Appellant's rights as secured by the Fifth, Sixth and Fourteenth Amendments.

The Appellant would further submit that the questions presented by this appeal are not only substantial, but are of great public importance warranting plenary

consideration by this Court to correct gross Constitutional errors and clear up substantial confusion in the interpretation by the Georgia Courts of Georgia's penal statutes.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served three (3) true and correct copies of the foregoing Jurisdictional Statement by United States Mail, postage prepaid, upon:

James T. Martin, Esq.
Assistant District Attorney
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This 22nd day of April, 1983.

ROBERT L. BARR, JR.
Attorney for Appellant

APPENDIX "A"

October 18, 1982

No. 63999

SAMUEL THOMAS RICKMAN, Appellant,
v.
STATE OF GEORGIA, Appellee

Rehearing Denied November 12, 1982
Application for Certiorari Denied January 5, 1983
Application for Rehearing Denied January 25, 1983

SHULMAN, Presiding Judge

Appellants were tried together and convicted of possession of cocaine. Each now appeals from the judgment entered on the jury's verdict.

The following facts could be adduced from the evidence presented at trial. Using an informant as an intermediary, an undercover police officer made arrangements to purchase a kilogram (2.2 lb.) of cocaine from appellant Hoskens. After meeting Hoskens at a Delk Road motel, the undercover officer and Hoskens proceeded to the Best Western Motel on Interstate 20 to rendezvous with people arriving from Alabama for the deal. The officer and Hoskens' female companion rented adjoining rooms at the motel (Rooms 105 and 107). Surveillance teams stationed near the Best Western observed appellants Rickman and Ellis arrive in a car with Alabama tags and park next to Hoskens' automobile. The latest arriving appellants went into the

motel, returned to the car, retrieved from it a brown briefcase, and reentered the motel.

Meanwhile, the undercover officer, having seen one pound of cocaine, having been told the remainder of the kilogram was "next door," and having been satisfied with the cocaine sample provided to him by Hoskens, left Room 107 of the motel and went to his parked automobile to obtain the money for the drug purchase. This conduct was the prearranged signal for the surveillance teams to assemble for the imminent arrests. The police officers gained access to Room 107 through the use of the undercover officer's room key, arrested Hoskens and confiscated a pound of cocaine. Upon knocking and announcing their identity as police officers at Room 105, they were met with the sounds of running water and a repeatedly flushed toilet. Using the manager's pass key, the officers entered that room to find Ellis standing by the door and Rickman in the bathroom with an empty plastic bag. Scrapings from the toilet bowl and the residue from the plastic bag were identified as cocaine. A search of Room 105 uncovered a glass vial containing what was later identified as cocaine from between the bed's mattress and box springs, and a plastic bag containing a white powdery substance later identified as cocaine from a shaving bag.

1. Appellant Hoskens, who pled a defense of entrapment at trial, now asserts that the verdict is contrary to the law. "Entrapment exists where the idea and intention of the commission of the crime originated with a government officer or employee, or with an agent of either, and he, by undue persuasion, incitement, or deceitful means, induced the accused to commit the act which the accused would not have committed except for the conduct of such officer." Code Ann § 26-905. Hoskens maintains that the state failed to prove he was predisposed to commit the crime. However, Hoskens himself testified that a police informant's alleged offer of $1,500 caused him to become involved in the purported sale of cocaine. "[T]he mere fact that the defendant was persuaded (if he was) by a friend to engage in practices he knew to be criminal simply to 'make a lot of money' does not constitute entrapment; if it did, practically every offender could find and rely on such incidents in his own past." Leonardi v. State, 154 Ga. App. 402, 405 (268 SE2d 380). Hoskens' assertion of the general grounds is without merit.

2. Appellants Rickman and Ellis appeal from the denial of their motion to suppress evidence discovered pursuant to warrantless searches of Rooms 105 and 107 following their warrantless arrests.

An officer may make a warrantless arrest "if the offense is committed in his presence, or the offender is endeavoring to escape. . .or for other cause there is likely to be failure of justice for want of an officer to issue a warrant." Code Ann. § 27-207(a). A warrantless arrest is not violative of this statute if the officer had probable cause to make an arrest, i.e., if he knew facts and circumstances, based on reasonably trustworthy information, sufficient to warrant a prudent man to believe that the defendant had committed an offense. Watson v. State, 153 Ga. App. 545 (1) (265 SE2d 871). The knowledge that a pound of cocaine was in the room "next door" to Room 107; the failure of anyone to respond to police requests to enter Room 105; the continuous sounds of running water and a flushing toilet; and Rickman's fully-clothed presence in a running bathtub with an empty plastic bag was ample cause to arrest appellants. It was not error to refuse to suppress the plastic bag and its residue (later identified as cocaine) found with Rickman or the samples of white powder an officer viewed on the rim of the toilet bowl. Both were dicovered in the plan view of officers who had a legal right to be where they were at the time they saw the evidence. Brewer v. State, 129 Ga. App. 118, 119 (199 SE2d 109).

3. Appellants Rickman and Ellis also protest the admission into evidence of a glass vial containing cocaine. The vial was discovered between the mattress and box springs of one of the beds in Room 105 by police officers conducting a search of the room subsequent to appellants' arrests. Whether or not this evidence was illegally seized is immaterial in light of the fact that the amount of legally seized contraband sufficiently supports the jury's verdict. See generally Lentile v. State, 136 Ga. App. 611 (1) (222 SE2d 86) where this court affirmed a conviction for possession of marijuana after suppressing some of the evidence pertaining to that charge.

4. The remaining contraband introduced at trial was discovered in Room 107 or in a blue shaving bag found in Room 105. At trial, Hoskens identified the bag as his. Since neither appellant Rickman nor appellant Ellis established that he had "a legitimate expectation of privacy" in Room 107 (rented by the undercover officer) or in Hoskens' blue shaving bag which he had left in Room 105, neither showed that his Fourth Amendment rights were violated with regard to the items seized from Room 107 and the shaving bag. Having failed to establish a violation of their Fourth Amendment rights, appellants do not have standing to

challenge the constitutionality of these searches. United States v. Salvucci, 448 U.S. 83 (100 SC 2547, 65 LE2d 619).

5. Rickman and Ellis argue that warrants could have been procured by the police prior to the arrests and search. This contention is without merit. In Lentile v. State, supra, p. 613, "the rendezvous point was not agreed upon until approximately an hour and a half beforehand, and it does not appear that the agents knew in advance that the defendant planned to proceed from the rendezvous point to his residence." That situation is analogous to the present one in that the police officers did not know beforehand that the deal would be moved to a different motel. It was not until Hoskens and the undercover officer met at the location originally agreed upon that it was decided that the sale would take place at another site. The drug purchase occurred approximately an hour and a half after the undercover officer's arrival at the second motel. As in Lentile, the time span was not so long as to require the procurement of a warrant.

6. Each appellant enumerates the denial of his motion for severance an error. Such a motion is committed to the sound discretion of the trial judge, whose ruling is subject to reversal only for an abuse of dis-

cretion. Montgomery v. State, 156 Ga. App. 448, 452 (274 SE2d 804). "Some of the considerations for the court in exercising its discretion have emerged from the cases considering motions to sever: 1. Will the number of defendants create confusion of the evidence and law applicable to each individual defendant? 2. Is there a danger that evidence admissible against one defendant will be considered against another despite the admonitory precaution of the court? 3. Are the defenses of the defendants antagonistic to each other or to each other's rights? [Cit.] If the defendant can show the court by some facts that failure to sever will prejudice him under one or more of these considerations, his motion should probably be granted." Cain v. State, 235 Ga. 128, 129 (218 SE2d 856). Furthermore, "the trial court's denial of the motion to sever will not be disturbed unless the defendant can make a clear showing of prejudice. [Cits.]" Depree v. State, 246 Ga. 240, 241 (217 SE2d 155).

Each appellant maintains that Hoskens' assertion of the defense of entrapment was antagonistic to the pleas of not guilty propounded by Ellis and Rickman. "The mere fact that co-defendants' defenses are antagonistic is not sufficient in itself to warrant separate trials. [Cit.] A showing of harm is necessary. [Cit.]" Cain

v. State, supra, p. 129. Each appellant complains that he was harmed by the evidence admitted against his co-defendants. We disagree.

Because Hoskens' entrapment defense required him to admit the commission of the offense with which he was charged, we are unable to find that Hoskens was prejudiced by the evidence adduced against his co-defendants. McDonald v. State, 156 Ga. App. 143 (5) (273 SE2d 881). Insofar as Rickman and Ellis are concerned, the evidence, as previously summarized, was sufficient for a rational trier of fact to determine beyond a reasonable doubt that Rickman and Ellis were parties to the crime. See Code Ann. § 26-801. "While Code Ann § 26-801 does not use the word 'conspiracy' it is plain that it embodies the theory of conspiracy" (Hamby v. State, 158 Ga. App. 265 (2) (279 SE2d 715)) and, under such a theory, "each of the acts and statements of each of the participants in the criminal enterprise was the same as if [Ellis and Rickman] had done the act or made the statement himself. Thus, whether such evidence was admitted at a severed trial or at a joint trial, the effect and impact legally is the same." Montgomery v. State, supra, p. 451. Consequently, none of the appellants has demonstrated harm or prejudice accruing from the denial of his motion to sever.

Accordingly, the denial of the motions to sever was not error.

7. In a related enumeration, appellant Ellis asserts as error the trial court's denial of his motion to be excused from the courtroom. Ellis made the motion after he had rested his case without presenting any evidence in his defense and prior to the presentation of a defense by appellant Hoskens.

In Georgia, a criminal defendant has a constitutional right to be present at all stages of his trial. Code Ann. § 2-111; Wilson v. State, 212 Ga. 73 (1) (90 SE2d 557); Durrett v. State, 135 Ga. App. 749 (2) (219 SE2d 9). Such a right can be waived by the defendant. See Wilson, supra. However, the exercise of a waiver of a constitutional right is not an absolute right, and the trial court must exercise its discretion when presented with a defendant's request to waive a constitutional right. It cannot be said that the trial court erred when it made a ruling which ensured the enforcement of the defendant's constitutional right.

8. Both Rickman and Ellis complain that the trial court's refusal to give requested instructions after the denial of their renewed motions to sever was error. Appellants sought to have the jury informed that they were not to consider against Ellis and Rickman any

evidence introduced after those defendants had rested. Such a charge would have been inappropriate in light of the state's use of Code Ann. § 26-801 concerning parties to a crime. Furthermore, it was not error to refuse to give the requested instruction since the trial court could have exercised its discretion and allowed the state to reopen its case and present additional evidence. See King v. State, 230 Ga. 581 (3) (198 SE2d 305); Burden v. State, 182 Ga. 533 (3) (186 SE 555).

9. Appellants Ellis and Rickman contend that error resulted from the trial court's refusal to grant their motions for a mistrial after the jury had allegedly discussed evidence before the case had been submitted to it. Appellants' enumeration is based upon a handwritten note submitted by a juror to the trial judge on the third day of the six-day trial. The note, written on a paper towel, read: "Please clarify: 1. What is an "agent?" 2. Are all agents police officers? The attorneys have been using the terms agent and officer interchangeably." Appellants maintain that this note is evidence that the jury improperly discussed the case prior to the close of the evidence. However, the contents of the note in no way indicate that an improper discussion had taken place, that any of the jurors had

already formed an opinion on the case, or that a fair and impartial trial could not be had with this jury. "The question of whether or not to grant a mistrial lies within the sound discretion of the trial court. That decision will not be reversed on appeal absent an abuse of discretion." Roberts v. State, 242 Ga. 634, 636 (250 SE2d 482). No irregularity having been established and no harm having been sustained by appellants, the trial court did not abuse its broad discretion in deying the motions for mistrial. See Smith v. State, 218 Ga. 216 (2c3) (126 SE2d 789); Smith v. Blackshear, 127 Ga. App. 610 (194 SE2d 519).

10. Appellant Hoskens claims error in the trial court's refusal to poll the jury to determine whether its memebers had engaged in an improper discussion of the case. Inasmuch as no irregularity in the conduct of a juror was shown to have occurred, it was not necessary to poll the jury. Since the actions of the trial court were not abusive of its authority, appellant's contention is meritless.

11. Appellants Rickman and Ellis also appeal the denial of their motions for directed verdicts of acquittal. Each appellant maintains that because the sole connection between him and the contraband was "spatial proximity," each appellant was entitled to a directed

verdict of acquittal. See, e.g., McCann v. State, 137 Ga. App. 445 (224 SE2d 99).

"The trial court's refusal to direct a verdict of acquittal is error only where there is no conflict in the evidence and a verdict of acquittal is demanded as a matter of law. [Cits.] In reviewing the denial of a motion for directed verdict. . .the proper standard to be utilized by the appellate court is the 'any evidence' test. [Cits.] Sims v. State, 242 Ga. 256, 257 (248 SE2d 651).

Our review of the trial transcript leads us to conclude that there was evidence to support the trial court's denial of the motions for directed verdict. There was testimony that the undercover police officer had been informed by Hoskens that the cocaine would be brought to the Best Western by people from Alabama; Ellis and Rickman arrived in Ellis' car (which displayed an Alabama tag), parked next to Hoskens' station wagon and proceeded to the room which Hoskens' companion had rented. They returned to the car, retrieved from it a brown briefcase which was capable of containing a kilogram of cocaine, and re-entered the motel. When the police announced their identify and requested admission into the Ellis/Rickman room, the officers were greeted with the sound of a

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toilet being flushed repeatedly. After gaining entry to the room and overcoming Ellis' resistance, the officers apprehended appellant Rickman in the bathroom where he was holding a plastic bag which contained cocained residue. A scraping from the commode also revealed the presence of cocaine. Inasmuch as there was testimony that appellants Rickman and Ellis were linked to the possession of the cocaine by more than "spital proximity," the trial court did not err when it denied the motions for directed verdicts of acquittal.

12. Citing Cunningham v. State, 248 Ga. 835 (4) (286 SE2d 427), Rickman contends that the admission into evidence of the brown briefcase constituted reversible error. In Cunningham, the Supreme Court reversed the appellant's murder conviction on the ground that the two pieces of physical evidence, unconnected to the crime, were admitted into evidence and considered by the trier of fact. That holding is not applicable to the case at bar since the briefcase here was connected to the appellants: it was found in their room, appellants had been observed carrying it from Ellis' car to the motel, and it was posited that the cocaine had been transported within it. It was not error to admit it into evidence.

13. Rickman next complains that the trial court erred in charging the jury on the concept of parties to a crime because the statute (Code Ann. § 26-801) upon which the instruction was based is allegedly unconstitutional. Because appellant made no constitutional objection to either the charge or the statute at trial, we will not address his enumeration other than to note that the Supreme Court held that Code Ann. §§ 26-801 and 802 were not unconstitutionally vague, indefinite and overbroad in Wanzer v. State, 232 Ga. 523 (6) (207 SE2d 466). Corley v. State, 154 Ga. App. 301 (2) (268 SE2d 508). Inasmuch as the evidence authorized a charge on parties to a crime, there was no error in so instructing the jury.

14. Appellants Hoskens and Rickman contend that a tape recording of conversations electronically transmitted by means of a "body bug" worn by the undercover officer was improperly admitted into evidence.

Rickman maintains that the trial court erred when it permitted the state to play portions of the tape recording to the jury after the court had denied appellant's motion to have the tape independently tested. Three conversations transmitted by the "body bug" were played for the jury by the state in rebuttal to

appellant Hoskens' entrapment defense. In a pre-trial motion, appellant Rickman sought to have the tape independently examined to determine whether the tape had been altered and to see if inaudible portions could be made audible.

"A criminal defendant on trial for his liberty is entitled on motion timely made to have an expert of his choosing, bound by appropriate safeguards imposed by the court, examine critical evidence whose nature is subject to varying expert opinion." Sabel v. State, 248 Ga. 10, 17 (282 SE2d 61). Because we have concluded that the tape recording was not "critical evidence," we do not reach the question of whether it is subject to varying expert opinion, and we affirm the trial court's decision to deny appellant's motion for an independent examination of the tape and to allow the jury to hear portions of the tape at trial.

"'Critical evidence,' for the purposes of the due process clause, is evidence, that, when developed by skilled counsel and experts, could induce a reasonable doubt in the minds of enough jurors to avoid a conviction." White v. Maggio, 556 F2d 1352, 1357 (5th Cir. 1977), cited with approval in Sable v. State, supra, p. 18. The tape recording, as used, did not constitute "critical evidence" as that term has been

defined, and therefore the trial court did not err in refusing to allow an independent examination of the tape. It was not error to allow the jury to hear portions of the recording. See Tookes v. State, 159 Ga. App. 423 (3) (283 SE2d 642).

15. Hoskens' first argument against the admission of the tape is the alleged failure of the state to lay a proper foundation for the admission of a tape recording into evidence.

The basic steps for laying the proper foundation before a tape recording is admissible at trial are set forth in Steve M. Solomon, Jr., v. Edgar, 92 Ga. App. 207 (3) (88 SE2d 167), and its progeny. Since police officers testified "that the tape recorded was in condition to take testimony; that the operator of it was competent; that it was authentic and correct; that it had not been changed or altered; that it had been in their custody; and who the speakers were" (Estes v. State, 232 Ga. 703 (4b) (208 SE2d 806)), and "[t]here was absolutely nothing to indicate that [appellants'] statements were not voluntary and of [their] own choosing" (Brooks v. State, 141 Ga. App. 725, 735 (234 SE2d 541)), the proper foundation was laid and it was not error to admit the tape.

16. Lastly, appellant Hoskens argues that the lack of a transcript of the portions of the tape played before the jury resulted in an incomplete record for this court to review.

The record and transcript of the case, which includes the reel of tape as an exhibit thereto, have been examined by this court. Appellant's claim of an incomplete record is without merit. See State v. Knowles, 247 Ga. 218 (274 SE2d 468).

17. Rickman and Ellis each enumerates as error the denial of his motion for new trial. Any ground for reversal presented in those motions not discussed above must be deemed abandoned as unsupported claims of error under Court of Appeals Rule 15 (c) (2). Code Ann. § 24-3615 (c)(2).

Judgment affirmed. Quillian, C.J., and Carley, J., concur.

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta,
November 12, 1982

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

63923. Rodney W. Ellis v. The State
63999. Samuel T. Rickman v. The State

Upon consideration of the motions for a rehearing filed in these cases, it is ordered that they be hereby denied.

COURT OF APPEALS
OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ ALTON HAWK, Clerk.

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 1/5/83

Case No. 39430, Rickman v. The State

The Supreme Court today denied the writ of certiorari in this case.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 1/25/83

The motion for a reconsideration was denied today:

Case No. 39430, Rickman v. The State

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX "C"

Georgia Code Annotated

26-801 Parties to crime; punishment

(a) Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime.

(b) A person is concerned in the commission of a crime only if he: (1) directly commits the crime; or (2) intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity; or (3) intentionally aids or abets in the commission of the crime; or (4) intentionally advises, encourages, hires, counsels or procures another to commit the crime.

(Now O.C.G.A. § 16-2-20)

Georgia Code Annotated

26-802 Trial and conviction of parties who did not directly commit the crime

Any party to a crime who did not directly commit the crime may be indicted, tried, convicted, and punished for commission of the crime upon proof that the crime was committed and that he was a party thereto, although the person claimed to have directly committed the crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or is not amenable to justice or has been acquitted.

(Now O.C.G.A. § 16-2-21)

Georgia Code Annotated

79A-812 Attempt or conspiracy to commit offense under this article.

Any person who attempts or conspires to commit any offense defined in this article shall be, upon conviction thereof, punished by imprisonment not exceeding the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Now O.C.G.A. § 16-13-33)

Georgia Code Annotated

26-3201 Conspiracy to commit a crime

A person commits a conspiracy to commit a crime when he together with one or more persons conspires to commit any crime and any one or more of such persons does any overt act to effect the object of the conspiracy. A person convicted of criminal conspiracy to commit a felony shall be punished by imprisonment for not less than one year nor more than one-half the maximum period of time for which he could have been sentenced if he had been convicted of the crime conspired to have been committed, by one-half the maximum fine to which he could have been subjected if he had been convicted of such crime, or both. A person convicted of criminal conspiracy to commit a misdemeanor shall be punished as for a misdemeanor. A person convicted of criminal conspiracy to commit a crime punishable by death or by life imprisonment shall be punished by imprisonment for not less than one year nor more than ten years.

(Now O.C.G.A. § 16-4-8)

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APPENDIX "D"

26-501. (42 P.C.) Principals in first and second degrees. - A person may be principal in an offense in two degrees. A principal in the first degree is the actor or absolute perpetrator of the crime. A principal in the second degree is he who is present, aiding and abetting the act to be done; which presence need not always be an actual, immediate standing by, within sight or hearing of the act; but there may be also a constructive presence, as when one commits a robbery, or murder, or other crime, and another keeps watch or guard at some convenient distance.
(Now repealed.)

26-502. (43 P.C.) Punishment of principal in the second degree. -A principal in the second degree, except where it is otherwise provided, shall receive the same punishment that is provided for the principal in the first degree.
(Now repealed.)

26-601. (44 P.C.) Accessory defined. - An accessory is one who is not the chief actor in the offense, nor present at its performance, but is some way concerned therein, either before or after the act committed.

(Now repealed.)

26-602. (45 P.C.) Accessory before the fact. - An accessory before the fact is one who, though absent when the crime is committed, procures, counsels, or commands another to commit same.

(Now repealed.)

26-604. (47 P.C.) Accessory after the fact. - An accessory after the fact is a person who, after full knowledge that a crime has been committed, conceals it, and harbors, assists, or protects the person charged with or convicted of the crime.

(Now repealed.)

APPENDIX "E"

IN THE SUPREME COURT

OF THE STATE OF GEORGIA

SAMUEL THOMAS RICKMAN, Appellant, v. STATE OF GEORGIA, Appellee.	)	CASE NO. 39430

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that SAMUEL THOMAS RICKMAN, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final Order of the Supreme Court of the State of Georgia denying Appellant's Motion for Reconsideration of his Petitition for a Writ of Certiorari from the Court of Appeals of the State of Georgia, which Court affirmed the judgment of conviction against this Appellant. Said final Order of the Supreme Court of the State of Georgia was entered herein on January 25, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated this 19th day of April, 1983.

Respectfully submitted,

/s/
ROBERT L. BARR, JR.
Attorney for Appellant

120 South Park Square
Marietta, Georgia 30060
(404) 429-1442

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served three (3) true and correct copies of the foregoing Notice of Appeal, by United States Mail, postage prepaid, upon:

James T. Martin, Esq.
Assistant District Attorney
Cobb Judicial Circuit
P. O. Box 649
Marietta, Georgia 30061

Michael J. Bowers, Esq.
Attorney General
State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

I FURTHER CERTIFY that I have this date filed a true and correct copy of the foregoing Notice of Appeal with the Court of Appeals of the State of Georgia in Case No. 63999.

This 19th day of April, 1983.

/s/
ROBERT L. BARR, JR.
Attorney for Appellant